BANK ISLAM MALAYSIA BERHAD

v.

ADNAN BIN OMAR

HIGH COURT MALAYA, SHAH ALAM
DATO' RANITA HUSSEIN JC
[ORIGINATING SUMMON NO. 24-808-92]
18 JULY 1994

CONTRACT: Loan agreement - Loan granted under Islamic Bai-Bithaman Ajil concept - Whether valid - Whether plaintiff had full knowledge of the terms thereof - Whether parties ad idem.

PRACTICE & PROCEDURE: Order 83(3) RHC 1980 - Action for payment of loan secured by charge - Loan transacted under Islamic Bai-Baithaman Ajil concept - Defendant receiving only a portion of the loan amount stated in the charge document - Whether what was received amounted to "the amount of the advance" - Rule 3(3)(a) of O.83 RHC - Whether r. 3(3)(a),(c),(d) & 3(7) thereof complied with.

PRACTICE & PROCEDURE: Order 83 RHC 1980 - Action for payment of loan - Transactions under Islamic concept of Bai-Bithaman Ajil - Interest - Plaintiff's claim did not include claim for interest - Rule 3(3)(c) & (7) - Whether complied with.

WORDS AND PHRASES: "except where the Court in any case or class otherwise directs" - Order 83 r. 3(3) Rules of the High Court 1980.

By a letter of offer extended to the defendant which the defendant accepted, the plaintiff granted the defendant a loan of RM583,000, secured upon a charge over a certain parcel of land. The plaintiff granted this facility under the Islamic Bai-Baithaman Ajil loan scheme which in effect involved the execution of three simultaneous transactions between the parties, namely (1) the sale of the subject property by the defendant to the plaintiff for RM265,000 which was duly paid by the plaintiff (2) the plaintiff reselling the same to the defendant for RM583,000 payable in 180 instalments and (3) the defendant executing a charge over the land as security for the said debt of RM583,000.

It was a term of the charge document that in the event of any default in the payment of the loan instalments by the defendant, the plaintiff would be entitled to sell the charged land. The defendant defaulted in his payments and the plaintiff accordingly filed an originating summons under O. 83 Rules of the High Court 1980 praying for an order for the sale of the land to recover the said loan. The defendant challenged the plaintiff's right to relief under the said O. 83 on the ground that there was no compliance with Rule 3(3) thereof.

The main issue was whether by virtue of the fact that the defendant only received RM265,000 of the stated loan amount of RM583,000, and by virtue further that the plaintiff's claim did not include the claim for interest, the Bai-Baithaman Ajil loan scheme ascribed to by the parties herein had failed to comply with the provisions of r. 3(3)(a)(c) and (d) of O. 83 RHC 1980.

Held:

[1] The transactions between the parties were above board and made with the full knowledge of the defendant who knew that the entire exercise was to implement the grant of a loan to him in such a way as to bring the loan transaction within the limits of Islamic Law. His knowledge of this is evidenced by his acceptance of the letter of offer containing all the terms of the loan. In the circumstances the parties were *ad idem* in treating the amount of RM583,000 as the facility amount given to the defendant by the plaintiff, which amount coincided with the price of the land in the second sale and purchase agreement whereby the land was resold to the defendant and for which the charge was meant to secure. This being the case, this Court can only accept the plaintiff's statement of the amount of advance under O. 83 r. 3(3)(a) as being RM583,000. The amount is in accord with the intention of the parties and the defendant cannot now dispute the amount.

[2] In any event the words " except where the Court in any case or class otherwise directs" in the preambular part of r. 3(3) of O. 83 RHC indicates that the Court may exercise its discretion to allow a certain flexibility in the requirements of that provision in particular cases. The instant case is one instance where such discretion should be exercised.

[3] A reading of O. 83 r. 3(3)(c) RHC in the context of the purpose of the whole order can only lead to one reasonable interpretation and that is, that there must be an amount of interest or an amount of instalment in arrears at the given date, but not necessarily both. The crucial precondition is the fact of default of payment of

whatever amount. In the present case there is no question of there being any interest because of the Islamic nature of the loan. Be that as it may, as the defendant's default is in respect of the instalment payments and as this has been duly particularised by the plaintiff, there has been compliance with the said provision.

[Application granted].

Legislation referred to:
Rules of the High Court 1980, O. 83 rr. 3(3) (a) (c) (d), 3(7)

For the plaintiff - T. K. Joshi; M/s. S. C. Saini & Associates
For the defendant - Mohd. Ismail Shariff; M/s. Mohamed Ismail & Co.

JUDGMENT

Ranita Hussein JC:
The plaintiff filed an originating summons under O. 83 of the High Court Rules 1980 praying for an order for the sale of land charged to it by the defendant.

In his affidavit in support of the summons the plaintiff averred that a facility amount of RM583,000 had been granted to the defendant by the plaintiff and this was secured by a charge of the land in question by the defendant to the plaintiff. The plaintiff clarified that the facility amount was granted under the Islamic concept of Bai-Bithaman Ajil which, as practised by the Islamic Bank, involved three simultaneous transactions which in the instant case were as follows:

(i) On 2 March 1984 the defendant sold to the plaintiff a piece of land for RM265,000 which sum was duly paid to him;
(ii) On the same date, the plaintiff resold the same piece of land to the defendant for RM583,000 which amount was to be paid by the defendant in 180 monthly installments,
(iii) Also on the same date, the said land was charged to the plaintiff by the defendant as security for the debt of RM583,000.

These transactions were preceded by a letter of offer by the plaintiff describing the terms involved under the Bai-Bithaman Ajil concept, which was accepted by the defendant.

It was a term of the charge document that in the event of any default in the payment of the loan installments by the defendant, the plaintiff would be entitled to sell the charged land. The defendant had defaulted in his instalment payments since April 1985.

At the hearing of the summons the defendant challenged the plaintiff's right to relief under O. 83 of the High Court Rules 1980, on the following grounds:

(i) the amount of RM583,000 which was stated as a loan in the charge document was never received by him as a loan; it was just a facility amount and he only received RM265,000. There was thus no compliance with O. 83 r. 3 (3)(a);
(ii) There was no compliance with O. 83 r. 3 (3)(c) in that the plaintiff's claim did not include a claim for interest; In this respect the plaintiff also did not comply with O. 83 r. 3 (7).
(iii) There was no compliance with O. 83 r. 3 (3)(d) because the amount which remained unpaid under the charge was not RM543.995.89 or any definite amount as it was subject to rebate (muqassah) as stated by the plaintiff in paragraph 16 (iv) of his affidavit of 9 March 1991.

Order 83 rule 3(3)(a)
It is relevant to note that all the aforementioned transactions between the parties were above board and made with the full knowledge of the defendant. He knew that the entire exercise was to implement the grant of a loan to him by the bank, the repayment of that loan inclusive of a profit margin by him, and the charge of his land as security for the loan. This was done by way of a couple of land transactions in order to bring the loan transaction within the limits of Islamic Law. His knowledge of this is evidenced by his acceptance of the letter of offer containing all the above terms (Exhibit AB 8 of enclosure (22)). Moreover, the two sale and purchase agreements in respect of the land made express reference to the Bai-Bithaman Ajil scheme. In the circumstances, I find that the parties were *ad idem* in treating the amount of RM583,000 as the facility amount given to the defendant by the plaintiff. The facility amount coincides with the price of the land in the second sale and purchase agreement whereby the land was resold by the plaintiff to the defendant; and it is this amount which is meant to be secured by the charge.

In view of the circumstances of the loan I am persuaded to accept the plaintiff's statement of

the amount of advance under O. 83 r. 3 (3)(a) as being RM583.000. In my view this is in accord with the intention of the parties and the defendant cannot now dispute the amount.

In any case, the words except where the Court in any case or class otherwise directs' in the preambular part of r. 3 (3) indicates that the Court may exercise its discretion to allow a certain flexibility in the requirements of that provision in particular cases. To my mind this is one instance where such discretion should be exercised.

Order 83 rule 3(3)(c)

A reading of O. 83 r. 3 (3)(c) in the context of the purpose of the whole order can lead to only one reasonable interpretation; And that is that there must be an amount of interest or an amount of instalment in arrears at the given date, but not necessarily both. The crucial precondition is the fact of default of payment of whatever amount. The intention is to show a calculation of such amount whether it be one of interest, of instalment or both. In the present case there is no question of there being any interest because of the Islamic nature of the loan. The defendant's default is in respect of the instalment payments and this has been duly particularised by the plaintiff. I am, as such, satisfied that there has been compliance of the said provision.

Order 83 rule 3 (7)

The defendant's argument that the plaintiff has no recourse to O. 83 as he has omitted to "state the amount of a day's interest" in accordance with r. 3 (7), defies logic. The premise for invoking r. 3 (7) is that there exists 'a claim for interest to judgment'. In this case there is no claim for interest and, therefore, there is no need whatsoever to state the amount of a day's interest.

Order 83 rule 3 (3) (d)

The defendant averred that the statement of balance due was not the correct amount because the maturity date for the loan is 2 March 1999 and any payment which he makes now would entitle him to rebate in the total sum owed on account of early recovery, as stated in the plaintiff's affidavit of 9 March 1991. However, as explained by the plaintiff, the relevant agreements give the defendant no right to rebate. This rebate or 'muqassah' is practised by the plaintiff on a discretionary basis. In any event, there was no question of early repayment as the loan was not a term loan and the defendant's failure to pay the installments was a breach of the agreement which has invoked the plaintiff's right to terminate the facility and demand for immediate full repayment of the loan.

I found that the defendant has failed in his defence on all counts and I accordingly made an order for the plaintiff as prayed.